IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-192

NEW YORK GASLIGHT CLUB, INC., and JOHN ANDERSON, Manager of the New York Gaslight Club, Inc.,

Petitioners,

VS.

MS. CIDNI CAREY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari, seeking review of the Decision of the United States Court of Appeals for the Second Circuit (entered May 8, 1979). The Opinion has not yet been officially reported.

Question Presented

Did the United States Court of Appeals correctly hold that an aggrieved civil rights Plaintiff is entitled to recover attorney's fees under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. Section 2000(e) *et seq.*) for the successful prosecution of an employment discrimination matter in the New York State Division of Human Rights pursuant to the formal deferral of the

matter to said State Agency by the Equal Employment Opportunity Commission (under 42 U.S.C. Section 2000(e)-5(c)).[1]

Statement of Case

On or about August 27, 1974, the Respondent (Plaintiff-Appellant below), a Black American citizen, sought a waitress position with the Petitioner New York Gaslight Club, Inc. (Defendant-Appellee below). After auditioning and otherwise being interviewed, the Respondent was advised that there was no position available.[2]

Believing that she was denied a position as a waitress with the Petitioner Gaslight Club, Inc., because of her race, the Respondent filed a complaint with the New York District Office of Equal Employment Opportunity Commission (EEOC) on or about January 9, 1975.

On January 24, 1975, the EEOC advised the Respondent's attorney that a complaint, which said attorney had filed on behalf of the Respondent, had been received by the office and accepted.

On January 28, 1975, the New York State Division of Human Rights advised the Respondent that, pursuant to

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[1] The Circuit Court below posed the question in this form:

"The issue in this case . . . is whether the general policy of awarding attorney's fees to successful plaintiffs in Title VII actions envisions an award to a party who is successful in pursuing her claim before the state human rights agency without having to pursue her case in federal court. . . . The question is whether §706 (k) encompasses fee awards to complaining parties who succeed at a step in the statutory scheme before they are forced to litigate their claims in federal court."

See: Appendix to Petition for a Writ of Certiorari at page A4.

[2] The evidence of the same and as otherwise set forth is contained in an Affidavit to the District Court reproduced as Appendix "H" hereto at pages 35a-43a.

the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000(e)-5(c)), her complaint to the EEOC had been deferred to it. The Division directed the Respondent to file a complaint with its office within sixty (60) days.

On February 21, 1975, the Respondent filed a verified complaint with the New York State Division of Human Rights charging the Petitioners and Ray Angelic with discriminating against her by refusing to hire her because of her race (in substance the same charge which she brought against the Petitioners and Mr. Angelic in the EEOC).

After investigation, the New York State Division of Human Rights found probable cause to believe that the Petitioners had engaged in an unlawful discriminatory practice.

Conciliation efforts failed and the case was recommended for public hearing (pursuant to the Rules and Regulations of the New York State Division of Human Rights).

On May 20, 1975, Respondent's counsel wrote to the EEOC advising it that the Respondent was proceeding ahead in the State Division of Human Rights, per its deferral to said State agency, and inquiring of the status of the matter before the EEOC.

On May 22, 1975, the EEOC responded to the foregoing letter and indicated that, as soon as it was possible, an investigator would be assigned to the Respondent's matter and that she would be advised relative thereto.

Thereafter the matter came on for hearing before the New York State Division of Human Rights.

The Respondent was represented by James I. Meyerson, Esq., and George E. Hairston, Esq., attorneys on the staff

of the National Association for the Advancement of Colored People, who had been assisting the Respondent since prior to the commencement of the proceedings in the EEOC.

On August 13, 1976, the New York State Division of Human Rights held that the Petitioners had discriminated against the Respondent because of her race in violation of the Human Rights Law of the State of New York (See: Executive Law Sections 290 *et seq.*—18 McKinney's Sections 290, *et seq.*), although it concluded that Ray Angelic had not discriminated against the Respondent and dismissed the Complaint as to him.

The Division directed the Petitioners to offer to the Respondent a position as a waitress and to otherwise pay over to her a sum of money as a back pay award. No attorney's fee was awarded.[3]

On or about August 20, 1976, the Petitioners filed a Notice of Appeal from the afore-mentioned decision and Order to the New York State Human Rights Appeal Board, an agency independent of the New York State Division of Human Rights; and they secured a stay postponing implementation of the relief pending the outcome of the appeal therein.

On August 26, 1977, the New York State Human Rights Appeal Board affirmed the findings and determination of the Commissioner of the New York State Division of Human Rights.

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[3] The Human Rights Law of the State of New York does not provide for attorney's fees; and such fees have not been authorized. See: *State Division of Human Rights* v. *Gorton*, 302 N.Y.S. 2d 966, 32 A.D. 2d 933 (2nd Dept. 1969), *Motion to Dismiss Appeal denied* 306 N.Y.S. 2d 681, 25 N.Y. 2d 680 (1969). See also: *State Division of Human Rights on the Complaint of Luppino* v. *Speer*, 313 N.Y.S. 2d 28, 35 A.D. 107 (2nd Dept. 1970), *Reversed on other grounds* 324 N.Y.S. 2d 247, 29 N.Y. 2d 555 (1970).

Thereafter, the Petitioners appealed to the New York Supreme Court/Appellate Division-First Judicial Department, seeking to have the administrative determinations overturned, and obtained a stay temporarily postponing implementation of the relief, as ordered.

On November 3, 1977, said Court unanimously affirmed the administrative determinations. See: *New York Gaslight Club* v. *State Division of Human Rights on the Complaint of Carey*, 59 A.D. 2d 852 (1st Dept. 1977).

A subsequent Motion for reargument or in the alternative for leave to appeal to the New York State Court of Appeals was denied by the Appellate Division on January 10, 1978.

On February 14, 1978, the Court of Appeals of the State of New York denied the Petitioners leave to appeal thereto. See: *New York Gaslight Club, supra* at 43 N.Y. 2d 951 (1978).

From May 22, 1975 until on or about November 12, 1976, when counsel for the Respondent and a representative of the EEOC spoke over the telephone about the status of the proceedings in the State Division of Human Rights, there were no communications between the Respondent and the EEOC regarding the matter.

On or about November 13, 1976, Respondent's counsel forwarded to the EEOC copies of the brief and memoranda submitted by the various parties to the proceedings in the New York State Human Rights Appeal Board (which, at that time, were then pending upon appeal thereto by the Petitioners from the decision of the State Division in favor of the Respondent).

On July 13, 1977, the Respondent received a letter from the EEOC notifying her that it had decided not to litigate her matter and enclosing therein a Notice of Right to Sue Letter.

Thereafter and within the mandated ninety (90) day period, the Respondent filed a federal action (pursuant to both Title VII of the Civil Rights Act of 1964, as amended, and the Civil Rights Act of 1866, 42 U.S.C. Section 1981).

As far as known, no investigatory and/or conciliatory action was taken by the EEOC in this matter once the matter was initially deferred to the New York State Division of Human Rights, pursuant to 42 U.S.C. Section 2000 (e)-5(c).

While this matter was still pending in the New York State Courts (upon appeal thereto by the Petitioners from the administrative determinations adverse to their interest), the District Court convened a status conference.

The District Court was notified that the only issue which the Respondent anticipated litigating therein was the issue of whether or not the Respondent's attorney should be awarded attorney's fees for the success in the State Division of Human Rights (assuming that said success was maintained in the New York Courts, upon the efforts of the Petitioners to overturn the same, as it was anticipated), pursuant to the Title VII provisions authorizing the same. See: Letters attached hereto as Appendices "A", "B", "C", "D" and "E".

Ultimately, the Respondent's success in the New York State Division of Human Rights was upheld by the New York Court and the only issue, in fact, submitted to the District Court was whether the Respondent's counsel was entitled to an award of attorney's fees.

On July 27, 1978, the District Court issued an order dismissing the Complaint and otherwise marking the same off the Court calendar although the application for fees was still pending and submissions were subsequently made to

the Court relative to the same by counsel for both the Respondent and the Petitioners.

The District Court issued a decision on September 21, 1978 on the merits of the application for fees; See: *Carey* v. *New York Gaslight Club,* 458 F.Supp. 79 (S.D.N.Y. 1978), denying to Respondent's counsel attorney's fees, under Title VII, for the successes in the New York State proceedings, as described.[4]

Thereafter, on September 30, 1979, Respondent filed a timely Motion, seeking modification of the Memorandum Decision and leave to supplement the record.

The Petitioners filed papers in opposition to said Motion. In addition, Adele Graham, Esq., an attorney for the New York State Division of Human Rights, filed an affidavit in support of the Respondent's application, seeking to clarify the role of a Division attorney in the Division process. See: Appendix to Petition for Writ of Certiorari at pages A58-A61.

In said Affidavit, Ms. Graham set forth the policy, practice and role of the Division attorney within the State administrative proceedings; and she noted, categorically, that the Division encouraged complainants to obtain private counsel for the purposes of prosecuting their respective complaints in the State Division. Furthermore, Ms. Graham noted that the Respondent had obtained private counsel; and that, accordingly, the Division attorney did not participate in the administrative process.

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[4] Such action by the District Court must be considered to have been a reconsideration of its previous order of dismissal (to the extent, if any, that said dismissal raised problems relative to the issuance of the September order). Accordingly, the position articulated by the Petitioners in this regard is of little practical consequence herein; and this Court should not be concerned with the same in addressing the issue raised by this litigation.

Finally, Ms. Graham noted that, even where a Division attorney participates in the administrative proceedings and otherwise, the attorney acts for the Commissioner, upon the Complaint, and not for the Complainant.

On November 3, 1978, the District Court filed an Order, with notation, denying the Respondent's Motion (as described).

Believing that the District Court below was in error when it initially handed down its decision on September 21, 1978 and when it failed to modify the same, the Respondent filed a timely Notice of Appeal to the United States Court of Appeals for the Second Circuit.

On May 8, 1979, the United States Court of Appeals for the Second Circuit reversed the decision and order of the District Court and remanded the matter for consideration of an award of counsel fees (with Senior Circuit Judge Smith writing the majority opinion, in which Circuit Judge Mansfield joined and from which Circuit Judge Mulligan dissented).

Reasons for Denying the Writ

Respondent initially filed a formal complaint with the EEOC challenging the Petitioners' conduct under Title VII of Civil Rights Act of 1964, as amended.

Upon receipt of the same, the EEOC deferred the matter to the New York State Division of Human Rights (as it was required to do pursuant to Title VII of the Civil Rights Act of 1964); and said Commission held the complaint in suspension pending resolution in the State proceedings. See: *Love* v. *Pullman Co.*, 404 U.S. 522, 526, 92 S.Ct. 616, 30 L.Ed. 2d 679 (1972).

The Respondent then proceeded to utilize the State process in order to resolve her claim. As a consequence, the

EEOC was relieved of an administrative process at that time although it was not relieved of its legal obligation to the Respondent until it issued its July, 1977 Notice of Right to Sue Letter. Said letter was not issued until well after the New York State Division of Human Rights' proceedings had been completed, in full, and a favorable resolution secured by the Respondent (notwithstanding that the Commission could have issued said letter well in advance of the date on which it did so but elected not to do the same, thereby retaining its legal obligations pursuant to and under Title VII of the Civil Rights Act of 1964).

It is submitted, in light of the same, that the Respondent is entitled to attorney's fees for her successful prosecution of her EEOC complaint, a complaint which was, upon filing with the federal agency, deferred to the New York State Division of Human Rights for ultimate resolution.

In effect, the State proceeding was an extension of the federal proceeding and was envisioned by Congress to be a part of the entire federal statutory scheme.

That the state proceeding is part and parcel of the entire Title VII procedure is beyond question. See: *Harris* v. *Commonwealth of Pennsylvania,* 419 F.Supp. 10, 13 (M.D. Penn. 1976); *Plummer* v. *Chicago Journeyman Plumbers, etc.,* 452 F.Supp. 1127, 1136 (N.D. Ill. 1978); *Flesch* v. *Eastern Pennsylvania Psychiatric Institute,* 434 F.Supp. 963, 969 at footnote 3 (E.D. Penn. 1977); *Bell* v. *Wyeth Laboratories, Inc.,* 448 F.Supp. 133, 136 (E.D. Penn. 1978); *Equal Employment Opportunity Commission* v. *Delaware Trust Co.,* 416 F.Supp. 1040, 1044 (D.C. Del. 1976); *Presseisen* v. *Swarthmore College,* 386 F.Supp. 1337, 1340 (E.D. Penn. 1974); *Black Musicians of Pittsburgh* v. *Musicians Local 60-471,* 375 F.Supp. 902, 908-909 (W.D. Penn. 1974), *Affirmed without opinion* 544 F.2d 512 (3rd Cir. 1976);

Equal Employment Opportunity Commission v. *Wah Chang Albany Corp.*, 499 F.2d 187, 189 (9th Cir. 1974).[5]

In *Love* v. *Pullman Co., supra* at 404 U.S. 526, this Court found that, in furtherance of the purpose of Title VII of the Civil Rights Act of 1964 "to give state agencies a prior opportunity to consider discrimination complaints," it was not inappropriate for the Equal Employment Opportunity Commission to "hold a complaint in 'suspended animation'", pending the outcome of the state proceeding.

The reasons for Congress's inclusion of the State proceeding into the federal statutory scheme (where a state proceeding existed) were many fold, not the least of which was to ease the foreseeable case load which would descend upon the federal agency if it did not have a mechanism for deferring some of the potential case load to a competent state agency (without totally foreclosing its legal obligation and responsibility even in those situations).

It was obviously envisioned that matters deferred to the state agency (where appropriate) would result in the resolution of controversy either by way of conciliation or through a formal adjudicatory proceeding.

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[5] The Circuit Court below wrote in this regard:

"Deference to State mechanisms for resolving discrimination complaints is an integral part of the enforcement process under Title VII, 42 U.S.C. §2000e-5(c), and submission to state remedies is a jurisdictional prerequisite to EEOC action. See Equal Employment Opportunity Commission v. Union Bank, 408 F.2d 867, 869 (9th Cir. 1968). The Statutory framework of Title VII embodies a 'federal mandate of accommodation to state action.' Voutsis v. Union Carbide Corp., 452 F.2d 889, 892 (2nd Cir. 1971), cert. denied, 406 U.S. 918 (1972).

Thus, state human rights agencies play an important role in the enforcement process of Title VII, since they afford a chance to resolve a discrimination complaint in accordance with federal policy before such a complaint reaches the federal courts."

See: Appendix to Petition for Writ of Certiorari at pages A5-A8. See also: *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 39 L.Ed. 2d 147 (1974).

The instant case is a prime example of a deferral which, by way of formal resolution (as contrasted to a conciliatory resolution), permitted the EEOC to avoid addressing the entire controversy. See: Amicus Brief of the New York State Division of Human Rights to the Circuit Court below, in this regard, Appendix "F" hereto at pages 18a-19a.[6]

It is submitted that, by the mandated procedural deferral in this matter, the EEOC furthered the substantive purposes of Title VII of the Civil Rights Act of 1964 (to end discriminatory public and private employment policies, practices, and actions).

Thus, the Respondent is entitled to attorney's fees which, themselves, are designed to further the purposes of the Act. See: *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed. 2d 1263 (1968); *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed. 2d 280 (1975); *Lea* v. *Cone,* 438 F.2d 86 (4th Cir. 1971); *Evans* v. *Sheraton Park Hotel,* 503 F.2d 177 (Court of Appeals, D.C. 1974); *Parker* v. *Califano,* 561 F.2d 320 (Court of Appeals, D.C. 1977); *Johnson* v. *Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974); *Rios* v. *Enterprise Association Steamfitters Local 638 of U.A.,* 400 F.Supp. 993 (S.D.N.Y. 1975), *affirmed* 542 F.2d 579, 592-593 (2nd Cir. 1976), *cert. denied* 430 U.S. 911, 97 S.Ct. 1186, 51 L.Ed. 2d 588 (1977); *Mid-Hudson Legal Services, Inc.,* v. *G & U, Inc.,* 578 F.2d 34, 37 (2nd Cir. 1978). See also: Nussbaum, *Attorney's Fees in Public Interest Litigation,* 48 N.Y.U. L.Rev. 301, 321-322 (1973); Decision of the Circuit Court below in this regard (Appendix to Petition for

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[6] Addressing the 1978 Agreement between said agencies, the Division notes that:

". . . the 1978 Worksharing Agreement (Ex. B) 'in recognition of the common jurisdiction and goals, was intended to integrate the charge processing procedures and reduce duplication of effort by sharing primary responsibility' (Ex. B p.2)"

See: Appendix "F" hereto at page 19a.

Writ of Certiorari at page A5), citing *Mid-Hudson Legal Services, Inc., supra* at 578 F.2d 37 and *Johnson* v. *Georgia Highway Express, supra* at 488 F.2d 716.

To foreclose an award, in circumstances such as those reflected by the proceedings herein, would encourage persons to short circuit the deferral proceedings by seeking an EEOC Right to Sue Letter and, attendant thereto, litigating their claims in the federal courts, thus defeating the very purpose of the procedural requirement of deferral, to wit: "the promotion of dispute resolution through accommodation rather than litigation." See: *Weise* v. *Syracuse University,* 522 F.2d 397, 412 (2nd Cir. 1975). This is particularly so where it appears that an aggrieved person is likely to prevail in the state proceeding but without the potential for securing an attorney's fee award.

In effect, the Respondent herein would be penalized, without an award of fees, and otherwise foreclosed from securing complete Title VII relief because of the fact that, as a consequence of the Title VII deferral, she prevailed in said administrative proceeding.

Put another way, a Title VII defendant has no incentive to resolve the dispute in a state proceeding even after there has been a full scale evidentiary proceeding therein and the aggrieved party has prevailed. The position that there is nothing to lose (as there would be if attorney's fees could and would be awarded) undercuts conciliation and, at the bottom line, the mandate of Title VII as reflected by and through the deferral requirement.

Several courts, in similar (although not identical) circumstances, have awarded attorney's fees for the efforts incurred by a plaintiff in the administrative process where federal court action, relative to the substantive issue being controverted, has been obviated by the administrative proceedings and success therein.

Parker v. *Califano, supra* 561 F.2d 320 is particularly instructive. Addressing itself to whether the term "proceeding" as contained in Title VII "is broad enough to be properly construed to refer to either judicial or administrative proceedings", the Court held that it did and undertook an extensive analysis in support of its position, an analysis which the Circuit Court below referred to and adopted herein.

The *Parker* Court, relying on, among other authorities, *Newman* v. *Piggie Park Enterprises, supra* at 390 U.S. 400 and *Johnson* v. *Georgia Highway Express, Inc., supra* at 488 F. 2d 716, held that the award of attorney's fees encouraged the congressional policy designed to foster private enforcement of federal civil rights enactments and, ultimately, to secure broad compliance with the law.

Viewing the Supreme Court's emphasis of the "interrelatedness of Title VII's administrative and judicial enforcement scheme in the private sector", *Parker, supra* at 561 F.2d 331, citing *Alexander* v. *Gardner-Denver Co., supra* at 415 U.S. 47, the Court concluded "that in a Title VII suit, brought by a federal employee, attorney's fees awarded under Section 706(k) may include compensation for work done at both judicial and administrative levels". See: *Parker, supra* at 561 F.2d 324, noting that, "for a conscientious lawyer representing a federal employee in a Title VII claim, work done at the administrative level is an integral part of the work necessary at the judicial level." *Parker, supra* at 561 F.2d 333. See also: *Canty* v. *Olivarez,* 452 F.Supp. 762, 769 (N.D. Georgia 1978), citing *Parker* v. *Califano* with approval in this regard (again in the context of a federal administrative process); *Smith* v. *Califano,* 446 F.Supp. 530, 531 (D.C. D.C. 1978), citing *Parker, supra* and *Williams* v. *Boorstin,* 451 F.Supp. 1117, 1125-1126 (D.C. D.C. 1978); *Patton* v. *Andrus,* 459 F.Supp. 1189 (D.C. D.C.

1978); *Foster* v. *Boorstin,* 561 F.2d 340 (Court of Appeals, D.C. 1977); *Brown* v. *Bathke,* 588 F.2d 534, 638 (8th Cir. 1978); *McMullen* v. *Warner,* 416 F.Supp. 1163, 1167 (D.C. D.C. 1976).[7]

It is submitted that the fact that *Parker* addressed a federal employee and efforts in a federal administrative proceeding precedent to a Title VII district court proceeding (as contrasted to a state administrative proceeding by a private individual in the context of the private sector) should not have significant bearing on the application of the principles enunciated therein to the circumstances of the litigation herein (as the Circuit Court below so held. See: Appendix to Petition for Writ of Certiorari at page A9).

Thus, there is absolutely no basis for the position articulated by the Petitioners, citing the foregoing, that "the decision of the Court of Appeals is contrary to applicable federal law." See: Petition for a Writ of Certiorari at page 6. While there is no applicable federal case law *directly* in point, to the extent that there are analogous situations (as in *Fisher* v. *Adams,* 572 F.2d 406 (1st Cir. 1978), *Parker* v. *Califano, supra* at 561 F.2d 340, *Foster* v. *Boorstin, supra* at 561 F.2d 340), ". . . their reasoning supports a similarly favorable result." See: Opinion of Circuit Court below, Appendix to Petition for Certiorari at page A9.

In view of the foregoing Respondent submits that she should have been awarded attorney's fees by the District

[7] In Freedom of Information Act litigation, where "administrative" efforts were undertaken to secure information but said information was not forthcoming until after a lawsuit had been instituted, it has been held that attorney's fees are proper.
See: *Cuneo* v. *Rumsfield,* 553 F.2d 1360 (Court of Appeals, D.C. 1977). See also: *Nationwide Bldg. Maintenance, Inc.* v. *Sampson,* 559 F.2d 704 (Court of Appeals, D.C. 1977); *Vermont Low Income Advocacy Council* v. *Usery,* 546 F.2d 509 (2nd Cir. 1976).

Court as a consequence of her successful effort in the New York State Division of Human Rights and in light of the fact that said effort was an intricate part of the federal anti-employment discrimination enforcement scheme. The District Court, in effect, was being asked to assume final responsibility for the full and complete enforcement of Title VII (in the circumstances of this matter); and its refusal to do so, by and through the awarding of reasonable attorney's fees, was reversible error(as the Circuit Court below so held).

Notwithstanding that the Petitioner states "that Section 297(4)(a) of the New York Human Rights Law requires the Human Rights Division to present the complainant's case at the administrative level", See: Petition for Writ of Certiorari at page 10, such is not precisely the case; and the Circuit Court below so recognized the same in light of the position articulated by the New York State Division of Human Rights in an Amicus Brief to said Court (See: Appendix "F" hereto) and in the Affidavit of Adele Graham, an attorney for the Division, in the District Court (See: Appendix to Petition for a Writ of Certiorari at pages A58-A61). See: Opinion of the Circuit Court below, Appendix to Petition for Certiorari at pages A10-A12.

Moreover, the Petitioners' position that the New York State Law ". . . provides agency counsel at no expense to the complainant", See: Petition for Certiorari at page 6, is not accurate; nor is the fact that the "respondent's attorneys never requested, as permitted by Section 297(4)(a) of the New York Human Rights Law, the right to present the case solely on behalf of the complainant with the consent of the Division", See: Petition for Writ of Certiorari at page 10, of any significance (if it is accurate at all).

It is important to note that, at the investigative stage of the Division proceedings (after a complaint has been filed with the Division but before any sort of determination

is made), the Division attorney plays no role whatsoever. See: Amicus Brief, New York State Division of Human Rights (Appendix "F" hereto at page 17a), in this regard.

Such is significant since, at that stage, it is determined whether probable cause exists to go forward or whether the matter will be resolved summarily (in the form of a summary judgment type disposition—See: *Mitchell* v. *National Broadcasting Company,* 553 F.2d 265, 270-271 (2nd Cir. 1977)).

In the instant case, the Respondent's attorney appeared with her at the initial investigatory proceedings; and requested that certain information be produced. As a consequence, a probable cause finding was issued. Interestingly, approximately three years prior to that date, the Respondent, pro se, sought relief against the same Petitioners for discrimination (based on *sex*—as she charged); and a no probable cause finding was made. Thus, there is evidence that the presence of Respondent's counsel at the initial phase of this proceeding was very important, if not critical. See: Affidavit Upon Remand in support of Application for Fees, Appendix "G" hereto at page 24a.

Furthermore, as Ms. Graham points out in her Affidavit, See: Appendix to Petition for a Writ of Certiorari at page A59, the entire record before the State Division proceeding was made by the Respondent's counsel; and the Division attorney did not appear whatsoever, per the practice of the Division not to appear where private counsel is involved,[8]

[8] See: Amicus Brief of the New York State Division of Human Rights (Appendix "F" hereto at page 17a) where it is noted in this regard:

"At the hearing the Division attorney appears if the complainant has not retained private counsel; if the complainant has retained private counsel the Division attorney appears at the Division's option to protect the public interest."

in light of the overwhelming case load and the attendant policy to encourage private counsel to participate on behalf of complainants in Division proceedings. See: Affidavit of Adele Graham, Appendix to Petition for a Writ of Certiorari at page A59. See also: Amicus Brief, Appendix "F" hereto at page 17a.

It is submitted that the New York State Division of Human Rights attorney, while ostensibly representing the complainant in a Division proceeding, in fact represents the Commissioner of the New York State Division of Human Rights, upon the complaint, and not the complainant himself/herself. See: Affidavit of Adele Graham, Appendix to Petition for a Writ of Certiorari at pages A59-A60.

Thus, in a proceeding where the complainant does not prevail (by Commissioner's decision and order), the Division attorney cannot appeal the adverse decision, upon the complaint and for the complainant, because such would be inconsistent with the finding of the Commissioner whom the Division attorney, in fact, represents. See: Affidavit of Adele Graham, Appendix to Petition for a Writ of Certiorari at page A61.

Moreover, where the complainant secures only partial relief, upon prevailing, and seeks further relief in an appeal, the Division attorney will not represent the complainant in said effort since to do so would be inconsistent with the position of the Commissioner, whom said attorney represents upon the complaint of the charging party. See: Affidavit of Adele Graham, Appendix to Petition for a Writ of Certiorari at page A61.

Furthermore, where a party prevails before the Commissioner and an appeal is prosecuted by the non-prevailing party to the Appeal Board and the decision is reversed by the Appeal Board (against the complainant and the Com-

missioner), the Division attorney (who would appear before the Appeal Board to justify the decision of the Commissioner, upon the Complaint of the charging party) would not and cannot appeal the decision of the Appeal Board to the Courts of the State of New York.

It is apparent, therefore, that the Division attorney does not represent the complainant (charging party) but rather represents the Commissioner, upon the complaint of the charging party.

It is apparent, as well, that, in the instant case, the Division attorney represented the Commissioner and not the Respondent. Thus, as they did before the District and Circuit Courts below, so to herein Counsel

> "... for Gaslight has misstated ... the obligation of the Division to provide representation to the complainant at any stage of the proceedings before it. Likewise Judge Werker's holding that 'The plaintiff had the option of pursuing her state administrative remedies without incurring any expenses at all for legal service' inadvertently overstated and misconstrued the Human Rights Law, the Division's Rules, and its actual practices."

See: Amicus Brief, New York State Division of Human Rights, Appendix "F" hereto at page 18a. See also: Decision of the Circuit Court below at footnote 9 (Appendix to Petition at pages A11-A12) where the Court addressed these propositions, in depth.[9]

---

[9] To the extent that the Respondent secured "private" counsel, it is inconsequential that said counsel was, in fact, an employee of a public interest organization for attorney's fees purposes. See: Footnote 1 of the Decision of the Circuit Court below (Appendix to Petition for a Writ of Certiorari at pages A3-A4); *Reynolds* v. *Coomey*, 567 F.2d 1166, 1167 (1st Cir. 1978); *Rios* v. *Enterprise Association Steamfitters Local 638 of U.A.*, *supra* at 400 F.Supp. 996.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

NATHANIEL R. JONES, Esq.
CHARLES E. CARTER, Esq.
GEORGE E. HAIRSTON, Esq.
JAMES I. MEYERSON, Esq.
N.A.A.C.P.—1790 Broadway
New York, New York 10019
(212) 245-2100

Attorneys for Respondent

By: .....

Of Counsel:

JAMES I. MEYERSON, Esq.

Certificate of Service

James I. Meyerson, Esq., one of the attorneys for the Respondent herein, certifies that on the 30th day of August, 1979, I served three copies of the foregoing Brief in Opposition upon the attorneys for the Petitioners by mailing the same, postage prepaid, first class, as follows: Marvin Luboff, Esq., Kane, Kessler, Proujansky, Preiss & Nurnberg, P.C., 680 Fifth Avenue, New York, New York 10019.

Respectfully submitted

James I. Meyerson, Esq.
N.A.A.C.P.—1790 Broadway
New York, New York 10019
(212) 245-2100

Attorney for Respondent

By: .....

Appendices

Appendix A

(Letter, dated February 7, 1978)

LAW OFFICES
KANE, KESSLER, PROUJANSKY, PREISS & PERMUTT, P.C.

SIDNEY S. KESSLER
ALBERT N. PROUJANSKY
EDMUND PREISS
MARVIN LUBOFF
JEFFREY S. TULLMAN
MARTIN J. FRIEDMAN

NEAL A. PERMUTT

680 FIFTH AVENUE
NEW YORK, N.Y. 10019

(212) 541-6222

THOMAS A. KANE
HERBERT RAND
COUNSEL
SAMUEL T. PERMUTT
(1940-1975)

February 7, 1978

Hon. Henry F. Werker
United States District Judge
United States District Court
Southern District of New York
Foley Square
New York, New York 10007

RE: CAREY v. NEW YORK GASLIGHT CLUB, INC., et ano, 77 Civ. 4794 (HFW)

Dear Judge Werker:

After discussion with your Law Clerk at the pretrial conference on February 3, 1978, and thereafter discussion with counsel for the N.A.A.C.P. who concurs in this application, we request that the above-entitled action be placed on the Suspense Calendar pending the determination of a motion, at present pending before the New York State

Appendix A

Court of Appeals, which will be dispositive of most if not all of the issues in this lawsuit.

The plaintiff in this action has been awarded the relief sought herein in New York State Administrative and Court proceedings. The defendants herein have applied to the New York State Court of Appeals for permission to appeal from the affirmance by the Appellate Division of the findings of the New York State Division of Human Rights. Should that application be denied, the defendants herein will comply with the Order of the Court rendering the continuation of this action unnecessary. Should that application be granted, the issues sought to be litigated herein will be litigated in the State Court.

Accordingly, it is respectfully requested that this action be placed on the Suspense Calendar pending the resolution of the New York State Court proceedings.

Respectfully,

/s/ ML

ML:mi

cc: James I. Meyerson, Esq.
N.A.A.C.P.
Special Contribution Fund
1790 Broadway
New York, New York 10019

Appendix B

(Letter, dated February 17, 1978)

NAACP SPECIAL CONTRIBUTION FUND
1790 Broadway / New York, N. Y. 10019 / 245-2100

February 17, 1978

The Honorable Henry F. Werker
United States District Judge
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

RE: Carey vs Gaslight Club/77 Civ 4794

Dear Judge Werker:

Please be advised that the above-captioned and numbered matter was placed on the suspended calendar (as a consequence of a previous conference herein) because the matter was pending before the Court of Appeals of the State of New York.

The Court of Appeals did render a decision denying the Defendants herein the ability to prosecute a further appeal in this matter.

Thus, the Plaintiff herein has been successful in her state proceedings.

It would seem that the federal action could in all likelihood be dismissed. However, it is our considered opinion that, since we were compelled to file the Title VII action while the State proceeding was in process, we are entitled to some attorneys fees, if nothing else (assuming that the action is

Appendix B

otherwise dismissed but without committing my client to that position at this time).

I would suggest that this matter be scheduled for a conference before your honor in order to determine where the federal action will go. In the mean time, we will consult with the attorneys for the Defendants in order to be able to advise you our respective positions (some or all of which we may agree upon).

Thank you for your consideration and attention herein.

Sincerely yours,

/s/ JAMES I. MEYERSON
JAMES I. MEYERSON
Assistant General Counsel

Attorney for Plaintiff

JIM/

copy: Ms. Cidni Carey
Albert Proujansky, Esq.

Appendix C

(Letter, dated March 20, 1978)

Albert Proujansky, Esq.
Kane, Kessler, Proujansky,
Preiss & Permutt
680 Fifth Avenue
New York, New York 10019

Re: Carey vs. Gaslight Club

Dear Mr. Proujansky:

Per our telephone conversation on Friday, March 17, 1978, please be advised that I did appear in Court relative to the federal matter now pending herein; and that Judge Werker gave us one month within which to submit a brief in support of attorneys fees. He did advise us that the Plaintiff should submit her brief within two weeks; and that you would have two weeks within which to respond.

I am hopeful that I will be able to meet said schedule; but I am not entirely sure that I will be able to do so. However, I shall notify both you and the Court in this respect, if I am not able to do so.

I did advise the Court, as well, that I was hopeful that, at least as to the monetary judgment in the state proceeding, we would be able to work something out by the time of submission (on attorneys fees); and that, if we were able to do so, we would be able to, in all likelihood, dismiss the federal action save for the determination on the attorneys fees.

I did advise you, as well, in our telephone conversation that your associate, who did appear in your stead, advised me after we left the judges chambers (and without making

one iota of reference to the same during our rather lengthy conversation prior to appearing before the Court) that he had been informed by you to advise me that you had been informed that my client had, in effect, advised some persons in the Club that there were not enough Black waitresses in the Club and that she would "shut the Club down." He further advised me that you instructed him to state that, if she did not stop with such talk (I believe your associate utilized the word "politicing"), to quote your associate "we will run her out of the Club."

I advised you that I did not expect for you to convey these messages through your associates but directly to me (in view of the history of this litigation).

I also advised you that I considered the statement a threat.

You denied, that it was a threat but a warning. You also advised me that, if there had been substance to the assertion, you would have brought her up on formal charges.

Since apparently there was no substance thereto to bring her up on formal charges, I do not believe that there was substance for you to warn her.

I might point out to you that I consider a warning a threat; and I consider the warning (threat) herein totally unjustified.

As I indicated to you on the telephone, I did not believe that my client would, in fact, threaten to "close your Club." I did indicate to you that I would not be surprised if my client had indicated to persons that there were not enough Black waitresses in the Club (although I had not spoken with her in that regard but only to the extent that was) outlined in a letter to you which you had not received as of our conversation and which set forth therein a conversation which Ms. Carey had with a waitress representative

of the union and also the Manager of the Club). I, myself, do not believe that there are enough Black waitresses in your Club (and I indicated the same to you in our conversation).

I have since spoken with Ms. Carey. She did advise me in our telephone conversation that she never threatened to close the Club down.

She indicated to me that, in light of her conversation on Wednesday, (as outlined in my last correspondence to you), she appeared in the Club on Thursday and advised some waitresses that she really just wanted to do her job and she really did not want to ferment discomfort in the Club. She did advise the persons with whom she was speaking that the Club might eventually have more Black waitresses and that in fact others might not have their jobs (a natural thing in time). She did not threaten to close the Club; and we believe that there is at least one individual who would so testify.

She did indicate to me in our recent conversation that she learned that a waitress did advise one of the customers in the Club that she believed that she was going to be laid off because of the hiring of Ms. Carey (and referenced that assertion to race). While Ms. Carey did not hear the conversation, she was advised of the same.

In addition, Ms. Carey has since learned that she believes that a Petition will be circulated by waitresses in the Club to the effect that those waitresses do not believe that she (Ms. Carey) is the Gaslight Club type, whatever that means.

Let me again reiterate that I do not believe that there was any basis whatsoever for the warning/threat or whatever you want to call it.

Appendix C

While you are the attorney for the Gaslight Club and one who very strongly disagrees with both the determination and nature of the relief accorded herein (that advisement being told to me by you in several conversations), you are also a Director of that Club.

I do not know how to gage when you are acting as an attorney and when you are acting as a Director; but I will tell you categorically that, if retaliation charges and/or harassment charges need to be brought in this situation (and I am not stating that they will—merely projecting), I am hopeful that I will not have to include you as a Director. There is definitely a potential conflict.

You asked me on Friday why I did not take this matter up with the Union. I have no quarrel with the Union (nor do I hope that I have a quarrel any further with your Club). I would hope that as a Director of the Club and the attorney therefor you would undertake to deal with this problem forcefully.

I note that the Union has not yet gone out on a picket as you envisioned it might. Perhaps it is because you laid off the only other Black waitress whom I understand you have working for you. Per our conversation on Friday and your advisement of the same, I must confess that I am deeply distressed about the same notwithstanding your explanation of last hired/first fired (seniority).

In light of the order under which the Club is now operating it would seem to me that there is serious questions about your lay off of said Black individual.

I must tell you, in all honesty (as I try to be), that I am deeply concerned about your enforcement efforts and your desire to ameliorate tensions rather than to exacerbate the same.

Appendix C

Let me state again, we desire no problems. I understand that Ms. Carey worked the floor on Friday, March 17, 1978, and did quite well with the five or six tables. In fact, I understand her tips were somewhat larger than a regular and that the regular expressed some irritation with the same.

In any event, I understand there were no problems and we are glad of the same.

I do understand that Ms. Carey did see you on Friday and there was a greeting without more.

Ms. Carey advises that she is working three days this week (rather than the normal four) because it is holy week and will apparently be slow. She has no objection to the same (although she is somewhat disappointed since she needs the income); but she does understand that next week she will be given a full four day schedule.

I shall be back in touch with you respecting the settlement (hopefully) of the monetary judgment. I have been speaking with my client in this regard and we will have something to submit to you in within the next several days.

Thank you for your complete understanding and consideration herein.

Sincerely yours,

James I. Meyerson
Assistant General Counsel

Attorney for Complainant

JIM/sk
e
cc: Ms. Cidni Carey

Appendix D

(Letter, dated March 30, 1978)

March 30, 1978

The Honorable Henry Werker
United States District Judge
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: Carey vs. Gaslight Club, 77 Civ 4794

Dear Judge Werker:

At the conference convened in the above-captioned and numbered matter on Friday, March 17, 1978, you set a briefing schedule regarding the award of attorneys fees in this matter (in light of the Plaintiff's success in the New York State Division of Human Rights).

Said schedule set the submission of briefs for April 14, 1978. You did indicate that the Plaintiff should submit her brief by Friday, March 31, 1978.

Because of an overwhelming schedule the last two weeks, I have not been able to address myself to this matter. Accordingly, I would appreciate having until April 14, 1978 within which to submit. I have no objection to my adversary having two additional weeks therefrom within which to respond.

Thank you for your advisement and consideration herein.

Sincerely yours,

James I. Meyerson
Assistant General Counsel

Attorney for Plaintiff

JIM/sk
cc: Albert Proujansky, Esq.

Appendix E

(Letter, dated June 4, 1978)

(Letterhead of Kane, Kessler, Proujansky, Preiss & Nurnberg, P.C.)

June 4, 1979

By Hand

Hon. Henry F. Werker
United States District Judge
United States Courthouse
Foley Square, New York 10007

Re: Carey v. Gaslight Club, et al.
77 Civ. 4784

Honored Sir:

We are advised by counsel for the plaintiff that he received a call from your Chambers informing him that all papers which we feel appropriate to resolve the claim of attorneys' fees should be submitted to your office by June 6, 1979.

Counsel for the plaintiff and the undersigned have been conducting negotiations in an effort to resolve this matter. In the event that the matter cannot be resolved, we respectfully request that this matter be set down for a hearing, which we anticipate would not require more than one hour. The purpose of such hearing would be to permit us to establish that the beneficiary of this application is the NAACP Special Contribution Fund and that such Fund should not be entitled to recover more than they have ex-

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pended in the form of compensation to the attorneys on their staff who rendered services to the plaintiff herein.

Thanking you for your consideration of this request, we are

Respectfully yours,

/s/ Albert N. Proujansky

ANP:mmb
cc: James I. Meyerson, Esq.
NAACP Special Contribution Fund

Appendix F

(Brief of New York State Division of Human Rights/Amicus Curiae)

In the
UNITED STATES COURT OF APPEALS
For the Second Circuit

Ms. Cidni Carey,
Plaintiff-Appellant,

vs.

New York Gaslight Club, Inc., and John Anderson,
Manager of the New York Gaslight Club, Inc.,
Defendants-Appellees.

APPEAL FROM MEMORANDUM AND DECISION
(AND SUBSEQUENT ORDER RELATIVE THERETO)
OF THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMICUS CURIAE STATE DIVISION OF HUMAN RIGHTS

Statement of Interest

The New York State Division of Human Rights (hereinafter "the Division") is the nation's oldest fair employment practices commission. It was created in 1945 in exercise of the State's police power for the protection of the public welfare, health and peace of the people of the State of New York, and in fulfillment of the provisions of the Constitution of this State concerning civil rights.

Appendix F

The Division has developed procedures for carrying out its functions under the law, to eliminate unlawful discriminatory practices. It is the argument of the Division that the District Court erroneously interpreted the Human Rights Law and the Division's procedures thereunder. The interest of the Division herein is that the Court has before it an accurate account of the law, the Division's rules, and the actual facts of practice, with which the parties to this action are not necessarily knowledgeable.

Statement of the Background in the State Division of Human Rights

In January 1975, Appellant (hereinafter Carey) filed a complaint with the Federal Equal Employment Opportunity Commission (hereinafter EEOC) charging Appellee New York Gaslight Club, Inc. (hereinafter Gaslight) with an unlawful employment practice. Pursuant to Section 706 of Title VII of the Civil Rights Act of 1964 and to a contract with the Division the EEOC deferred the charge to the Division. The Division proceeded to act upon the charge pursuant to Section 297 of the New York State Human Rights Law, N.Y. Executive Law Art. 15 (McKinney's Vol. 18), by investigation, finding and determination of probable cause, and public hearing. An order favorable to Carey was issued after hearing, which, upon appeal, HRL Sections 297-a and 298, was affirmed by the State Human Rights Appeal Board and the Appellate Division of the Supreme Court. *N.Y. Gaslight Club* v. *S.D.H.R.*, 59 A.D.2d 852 (1st Dept. 1977). Leave to appeal was denied by the New York Court of Appeals. 43 N.Y.2d 951 (1978). Counsel fees to Carey's attorney, who participated at all stages of the proceeding from investigation through final

Appendix F

appeal, were not awarded. See *S.D.H.R.* v. *Gorton*, 32 A.D.2d 933 (2nd Dept. 1969); mot. to dis. app. den. 25 N.Y.2d 680 (1969).

Carey, having previously obtained a right to sue letter from the EEOC, then filed an action in the Southern District Court to recover counsel fees. This action was dismissed by Judge Werker, in a decision which discusses the State Human Rights Law.

ARGUMENT

I. The Law, Rules, and Practice of the State Division of Human Rights Reveal a Fundamental Distinction Between the Roles of Private Counsel for the Complainants and the Role of the Division Attorney.

Section 297 of the Human Rights Law sets forth the procedure to be followed in processing a complaint under the law. Subdivision 1 provides for the filing of a complaint which may be filed by an individual "or his attorney-at-law." Subdivision 2 provides for the investigation of the complaint; subdivision 3 provides for conciliation, and subdivision 4 provides the procedures for public hearing. Section 297-a establishes the State Human Rights Appeal Board, which, in subdivision 6, has the power "to hear appeals by any party to any proceeding before the Division from all orders of the Commissioner * * *." Section 298 provides for judicial review and enforcement in the Appellate Division of the New York Supreme Court. These various sections contain references to the Division attorney only as follows:

> "The case in support of the complaint shall be presented by one of the attorneys or agents of the division and,

at the option of the complainant, by his attorney. With the consent of the division, the case in support of the complainant may be presented solely by his attorney." HRL § 297.4.a.

"The Division may appear in court by one of its attorneys." HRL § 298.

The provision obviates appearances by the Attorney General of the State of New York on behalf of the Division. See N.Y. Executive Law, Section 63.

Section 295 of the Human Rights Law, listing the general powers and duties of the Division, includes in subdivision 5 thereof the power "[T]o adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions of this article, and the policies and practice of the division in connection therewith."

Rules were duly promulgated pursuant to this power, and were duly filed with the New York Secretary of State for publication in the Official Compilation of Codes, Rules and Regulations of the State of New York, equivalent to the Code of Federal Regulations, and which has the force and effect of law. 9 N.Y.C.R.R. § 465 et seq.) volume A-1; CCH Employment Practice Guide § 26075, pp. 8910 et seq.

Rule 456.6 refers to the investigation of a complaint (pursuant to Section 297.2 of the Law) by "the Regional Director . . . with the assistance of staff." Conciliation under Rule 465.7 is also left to the Regional Director. Rule 465.11 covers representation by an attorney. Subdivisions (d) and (e) are pertinent herein and are attached hereto for the Court's convenience. These sections reveal that dual representation by the Division attorney and a private attorney representing the complainant is not contemplated except in the unusual case and at the Division's option.

This rule, a 1977 codification of an existing procedure, was designed for two purposes: (1) conservation of the Division attorneys' time in a period of exceptionally heavy case loads and backlogs and (2) clarification of the role of the Division attorney vis-a-vis the complainant. The rules, carrying out the statutory mandate, and the actual procedures of the Division, work in actual practice as follows:

When a complaint is filed and investigated, the Division attorney does not appear except upon a special request made by the Regional Director for the purpose of representing and advising the Regional Director.

The Division is however aware that private counsel frequently represent complainants during this stage leading to a finding of probable cause or dismissal for no probable cause. Section 297.2. The finding of probable cause after investigation is a necessary preliminary to the public hearing stage. However, at no time is a complainant represented by a Division attorney at the investigation level.*

At the hearing the Division attorney appears if the complainant has not retained private counsel; if the complainant has retained private counsel the Division attorney appears at the Division's option to protect the public interest.

At the appellate level, the Division attorney appears to support the Division's order and to seek enforcement thereof pursuant to § 298. Here, the Division attorney represents only the Commissioner and the Division. The Division attorneys *can not* represent a complainant on appeal from an order of the Commissioner adverse to the com-

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* There is an exception to this procedure when the Division itself, pursuant to its authority under § 297.1, makes a complaint on its own motion. An attorney may be assigned to draft the complaint and to advise the regional staff in the investigation.

plainant. Nor can the Division attorney represent a complainant whose favorable order after hearing has been reversed by the Appeal Board. Such a situation recently occurred in the case of *Cox* v. *Dept. of Correctional Services,* 61 A.D.2d 25 (4th Dist. 1978). The Division cannot appeal from an order of the State Human Rights Appeal Board. *SDHR* v. *Niagara Mohawk—Power Corp.,* —— A.D.2d —— (4th Dept. 9-15-78) mot. for lv. to app. den. —— N.Y.2d —— (N.Y.L.J. 12-4-78, P. 7 col. 2).

Counsel for Gaslight has misstated, in its brief at 21-23, the obligation of the Division to provide representation to the complainant at any stage of the proceedings before it. Likewise Judge Werker's holding that "The plaintiff had the option of pursuing her state administrative remedies without incurring any expenses at all for legal services" inadvertently overstated and misconstrued the Human Rights Law, the Division's Rules, and its actual practices.

II. The Federal and State Agencies Function in an Integrated Scheme to Enforce the Public Policy of Combatting Discrimination.

The State Division of Human Rights is an official "706 Deferral Agency", under the provisions of the EEOC Rules and Regulations. 29 C.F.R. Part 1601, Section 1601.13. It stands in a contractual relationship with the Federal government under which moneys are received for the processing of those cases which fall within the jurisdiction of both agencies. Thus the State agency has a role, defined by Title VII of the Civil Rights Act of 1964 and refined by its contractual obligations, as seen in Exhibits A, B and C attached to the affidavit of Adele Graham accompanying

the motion for leave to file as amicus curiae, of a participant in an integrated Federal-State scheme.

Filing of a Division complaint is a condition precedent to filing a charge with the EEOC. The Division's jurisdiction is exclusively only for the first 60 days after the complaint is filed. Under the system called "dual filing," a complaint filed with the Division is deemed filed with the EEOC 60 days later, and a charge filed with the EEOC is deemed filed with the Division immediately. The statement of Gaslight in its brief at p. 10 is therefore erroneous. At the time the Carey complaint was filed in 1975, the procedure was otherwise; that is, complaints were originally filed with the EEOC which then literally deferred them by notifying the State agency of the filing of the charge. The State agency was then required to notify the charging party of the necessity to come in to the State agency to file a complaint. Thus the 1975 contract (Ex. C) refers to the resolution by the State of "jointly filed charges" "consistent with an ongoing cooperative effort" and "an efficient division of work between said District office and the contractor."

Likewise the 1978 Worksharing Agreement (Ex. B) "in recognition of the common jurisdiction and goals", was intended to "integrate the charge processing procedures and reduce duplication of effort by sharing primary responsibility * * *" (Ex. B p. 2)

Furthermore, the Memorandum of Understanding of June 8, 1976 (Ex. A) (an earlier version of the Worksharing Agreement) states:

> "In recognition of the common jurisdiction and goals of the two agencies and to provide an efficient procedure whereby individuals may invoke the full panoply of procedures and remedies available under the

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relevant state and federal laws, and Division and the Commission have endeavored to inform complainants/charging parties of their rights under both state and federal law, and have encouraged and assisted such individuals in filing with the other agency."

CONCLUSION

THE ROLE OF PRIVATE COUNSEL TO A COMPLAINANT UNDER THE HUMAN RIGHTS LAW IS DISTINGUISHABLE FROM THE ROLE OF AN ATTORNEY EMPLOYED BY THE STATE DIVISION OF HUMAN RIGHTS.

Respectfully submitted,

ANN THACHER ANDERSON,
General Counsel
Attorney for Amicus Curiae
State Division of Human Rights

By /s/ ADELE GRAHAM
ADELE GRAHAM
2 World Trade Center
New York, N. Y. 10047
(212) 488-5365

Appendix G

(Affidavit Upon Remand in Support of Application for Fees)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil No. 77 Civ 4784 (HFW)

MS. CIDNI CAREY,

Plaintiff,

VS.

NEW YORK GASLIGHT CLUB, INC., et al.,

Defendants.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

James I. Meyerson, being first duly sworn, deposes and says:

1. I am one of the attorneys for the Plaintiff herein; and I execute this Affidavit in that capacity.

2. I have been primarily responsible for the preparation and prosecution of all phases of this litigation, on behalf of the Plaintiff, including those efforts which transpired in the New York State Division of Human Rights and thereafter before the New York State Division of Human Rights Appeal Board and the New York State Courts.

3. In response to the June 4, 1979 letter to this Court from the attorneys for the Defendants herein (a copy of which is attached hereto), the following should be noted:

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a. Upon receipt of a copy of said letter, I did inquiry as to the policy of the National Association for the Advancement of Colored People, Special Contribution Fund, Inc. relative to the award of fees secured by an attorney in the employ of said Special Contribution Fund, Inc. who undertakes to represent a person or persons in civil rights oriented litigation addressing itself to racial discrimination.

b. I was advised that the policy is that fees are made payable to the attorney since the Special Contribution Fund, Inc. is not authorized to practice law and does not practice law (nor is the Special Contribution Fund, Inc. designated as an organization whose function and purpose is in the nature of a law office).

c. I was advised that said fees are to be paid to the attorney or attorneys responsible for the litigation; and said attorney is then responsible for the payment over to the Special Contribution Fund, Inc. those costs expended in the prosecution of the litigation by said Special Contribution Fund, Inc. as well as a proportionate sum representing the hours spent by said attorney in the prosecution of the matter (pro-rated according to the yearly salary received by said attorney and the number of hours of work by the attorney during the course of employment during which the litigation was on-going).

d. Said policy is basically the same policy under which I previously received attorney fees as a consequence of my efforts in preparing and prosecuting the case encaptioned *Hart* v. *Community School Board*, 512 F. 2d 37 (2nd Cir. 1975), a successful school desegregation matter involving the City School District of the City of New York.

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e. Any fees left after reimbursement to the Association, Special Contribution Fund, Inc. (per the formula described heretofore) are left to the attorney to whom said fee is paid initially for use by said attorney in his/her discretion.

4. In order to properly document my efforts herein, I offer the following summary thereof, based on a review of my files:

a. The Plaintiff herein, Ms. Cidni Carey first sought my assistance in January, 1975. At that time I was employed in the office of the General Counsel of the N.A.A.C.P. Special Contribution Fund, Inc., as a full time staff attorney (with the title of Assistant General Counsel). I had been so employed in said capacity since October 15, 1970.

b. As I recall the same, Ms. Carey was specifically referred to me by name as a consequence of having spoken to a news reporter who gave her my name.

c. I spent several hours with Ms. Carey during our initial meeting on or about January 8, 1979.

d. During that period of time, Ms. Carey related certain facts to me about her efforts to secure a position in the New York Gaslight Club, Inc. during the previous August (1974). Ms. Carey related to me that approximately four (4) years prior to her August effort she had attempted to secure a position with the New York Gaslight Club, Inc. but

that she had been turned down as a consequence thereof.

e. Ms. Carey indicated to me that, at that time, she did file a Complaint with the New York State Division of Human Rights alleging that she had been discriminated against because of her *sex;* but that, after an investigative conference (where she appeared without counsel), the New York State Division of Human Rights did issue a non probable cause finding on her complaint (dismissing the same).

f. After discussing the matter with Ms. Carey, in depth, I did undertake to draw up a complaint against the New York Gaslight Club, Inc. and others. I drew up the Complaint at the time Ms. Carey first appeared in my office; and, after reading through the same, Ms. Carey did sign it and document was notarized.

g. Said Complaint was filed, per the caption thereof, with the Equal Employment Opportunity Commission. I did forward the original and two copies of the same with a cover letter, on behalf of my client.

h. Thereafter, Ms. Carey did receive a notice from the Equal Employment Opportunity Commission to proceed to the New York State Division of Human Rights (under deferral) for the purposes of filing a Complaint (based on the allegations contained in her Complaint, as I had drawn the same, filed with the Equal Employment Opportunity Commission).

i. I did consult with Ms. Carey about the same; and, thereafter, Ms. Carey did proceed to an office of the

State Division of Human Rights to file the appropriate Complaint (on a form provided by the New York State Division of Human Rights). Said Complaint was filed on February 21, 1975 shortly after Ms. Carey received the afore-mentioned Notice from the Equal Employment Opportunity Commission and shortly after Ms. Carey consulted with me in this regard.

j. Thereafter, I did receive a Notice of conference from one Mr. Courtney Brown, Regional Director of the Office of the New York State Division of Human Rights, State Office Building, 125th Street, New York, New York. I received said Notice from Mr. Brown on or about March 11, 1975 and did advise my client of the same. Said conference was scheduled for March 21, 1975 at 3:00 P.M.

k. Thereafter, I did consult with my client and I did appear with her at the conference on March 21, 1975.

l. I did receive communications and otherwise undertake communications with the attorney for the Defendants; and I did correspond and communicate with Mr. Courtney Brown (subsequent to the aforestated conference).

m. Efforts at conciliation of the matter were taken subsequent to the conference, with the Plaintiff attempting to secure the position which she felt had been denied to her because of her race. They failed; and at the end of May, 1975, the New York State Division of Human Rights did issue a Probable

Cause letter directing that the matter be set for public hearing.

n. Thereafter, at the end of June, 1975 (more precisely June 23, 1975), I did write to the New York State Division of Human Rights seeking to have the matter set for hearing since I had not yet received notice of a date of hearing (the notice of probable cause having been issued at the end of May, 1975).

o. Ultimately a hearing was scheduled before Norman Mednick, Hearing Examiner, New York State Division of Human Rights. Communication with the Division of Human Rights advised me that, since I was appearing for the Complainant therein, the Division would not appear at the proceedings (by an attorney) although said attorney was available for consultation.

p. I did consult with Mr. Terry Myers, an attorney with the New York State Division of Human Rights, relative to the issuance of subpoenas to require the Gaslight Club to produce documents, witnesses, etc. at the hearing, as said hearing was scheduled for September 22, 1975.

q. Because of a previous engagement which I had on said date and because of the desire to proceed ahead with the hearing, I requested that my associate, George Hairston, appear on the initial hearing date; and he did so. In that regard, I did communicate with my client and with Mr. Hairston; and I did meet with both in preparation for said hearing.

r. Said hearing was held on September 22, 1975.

s. Thereafter, said hearing was adjourned to January 15, 1976 at which time I did appear to conclude the hearing.

t. In the interim, I did consult with my client and otherwise correspond with the attorney for the Defendants and with the New York State Division of Human Rights.

u. I did obtain a copy of the September 22, 1975 hearing transcript; and, subsequent to the conclusion of the January, 1976 proceeding, I did obtain a copy of the transcript of said proceeding.

v. Thereafter, in February, 1976, I did submit a Brief in support of my client's position to the Hearing Examiner for his use in the decision in this matter. At this stage I did not believe that the New York State Division of Human Rights did, in fact, submit a post hearing memorandum.

w. Thereafter, in April, 1976, I did write to the New York State Division of Human Rights urging a decision since it had been almost two months since submission and since the hearing and record thereof was short.

x. Thereafter, in July, 1976, I did write to the New York State Division of Human Rights seeking a copy of the Hearing Examiner's recommendations to the Commissioner; and I did receive a copy of the same in which it appeared that said Hearing Examiner proposed to recommend a favorable decision.

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y. On August 13, 1976, the Commissioner of the New York State Division of Human Rights did hand down a decision in favor of the Plaintiff, finding that the New York Gaslight Club, Inc. was in violation of the Human Rights Law of the State of New York and directing that said Gaslight Club provide the Plaintiff with a position and compensate her in terms of back pay according to a formula set forth by the Commissioner in his opinion.

z. Thereafter, the Defendants did file a Notice of Appeal to the New York State Division of Human Rights Appeal Board and did seek a stay of the Order (both with respect to back pay and with respect to placing the Plaintiff in a position). I did prepare an Affidavit in Opposition to the Motion for a Stay; but said Application was granted in August, 1976.

aa. In October, 1976, I did draw up an Application for the Modification of the Stay previously issued in this matter by the Appeal Board. Such was necessitated by a change in circumstance of my client, with respect to employment, and the delay in setting this matter for hearing. Said Modification was opposed and denied.

bb. It should be noted that with respect to both the Opposition to the initial application for the stay (from the Appeal Board as submitted thereto by the Defendants) and the Modification Application made by the Plaintiff to said Appeal Board, the New York State Division of Human Rights did not undertake any efforts whatsoever.

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cc. Thereafter, the Defendants did submit a Brief to the Appeal Board; and I did undertake to prepare and file a Brief in support of the Plaintiff's position. Only at that point in time did the New York State Division of Human Rights enter an appearance, secure some additional time from the Appeal Board and submit a Brief in support of the Comsioner's Order.

dd. I undertook efforts to secure an expedited hearing on appeal to the Board, although I am not sure how successful my efforts were in that regard. The matter was set for argument before the Appeal Board in December, 1976; and I was advised that said argument was expedited, as a consequence of my efforts. I was advised that, because of the backlog and the nature and problems of the Appeal Board, the matter would not have otherwise been scheduled for argument at that time.

ee. I did appear at the argument before the Appeal Board; and I did present argument on behalf of my client. An attorney for the New York State Division of Human Rights (Sara Toll East, Esq.), who did prepare the Division's Brief, did appear as well and did present argument on behalf of the Commissioner.

ff. Thereafter, the Appeal Board of the New York State Division of Human Rights did affirm the decision of the Commissioner, handing down a decision in August, 1977. During the interim period of time (from argument to the date of decision) I communicated with my client on several occasions;

and I did communicate with the Appeal Board particularly after an undue length of time had transpired and no decision was forthcoming.

gg. Thereupon, the Defendants did file a Petition with the Supreme Court of the Appellate Division, First Department, seeking a stay of the Decisions and Orders of the Commissioner of the New York State Division of Human Rights and the New York State Human Rights Appeal Board. In that regard and on behalf of the Plaintiff I did prepare, file and serve an Answer to the Petition; and I did appear, along with the Attorney for the New York State Division of Human Rights, on behalf of the Commissioner, at a show cause hearing before the Appellate Division, First Department, with respect to the request for a Stay. At that proceeding, a stay was issued; but, at the same time, an expedited briefing schedule was set.

hh. Thereupon, I did file a Brief, on behalf of the Plaintiff, with the Appellate Division. Ms. East prepared and filed papers on behalf of the Division.

ii. The Appellate Division did affirm the aforementioned decisions and orders. The Defendants did seek reconsideration or leave to appeal; and, in that connection, I did submit papers in opposition thereto. Ms. East did prepare and file papers on behalf of the Commissioner.

jj. Thereafter, the Defendants did seek leave from the Court of Appeals to appeal from the Decision of the Appellate Division (as said decision affirmed the administrative determinations); but the Court

of Appeals denied leave. In that regard, I did prepare and file papers independent of the New York State Division of Human Rights.

5. The foregoing analysis sets forth, in substance, the efforts which I undertook in and during the state proceedings on behalf of the Plaintiff. They do not include the several efforts which I have taken, to date, on behalf of the Plaintiff in the federal proceedings (herein).

6. I am able to document the foregoing with specificity if such is deemed appropriate by the Court. The total number of hours spent on the administrative and court proceedings in the State, as described in Paragraph 4a-4jj, was fifty six (56) hours. The remaining hours, for which I seek compensation (as set forth in my Affidavit heretofore submitted prior to remand and resubmitted subsequent to the remand), total 26 for filing the Complaint herein (and preparing the same) and otherwise preparing and filing the Brief in support of the Application for fees (along with the several Affidavits).

7. By way of supplement to the previous application, I seek additional compensation for twenty five hours work in connection with the sucessful preparation and prosecution of the appeal herein and the efforts associated herewith subsequent to the remand. Among the efforts in this regard are: the preparation and filing of the Notice of Appeal, the preparation and filing of the Brief and Appendix to the Second Circuit, preparation and argument of this matter in and before the Second Circuit; and, upon remand, resubmission of papers previously filed in connection with the Application for Fees and attendance at

the conference in this regard and the preparation of the instant papers.

8. It should be noted that, in connection with my efforts as described in Paragraph 4a-4jj, it is my customary procedure and practice to confirm each conversation which I have in connection with a case (whether it be with a client or otherwise) in writing on the same date on which said conversation took place. In addition, whenever I receive a communication or send out a communication, it is my custom and practice to acknowledge receipt of the correspondence, document, etc. or to cover the document, etc. which I send out. Thus, by reviewing my files, I am able to document each and every telephone call, conversation, communication, and effort undertaken (as I have done heretofore in connection with the documentation of my hours and as I have done, again, in connection with the preparation of this document). Based on the same and in conjunction with my calendar I am able to confirm the hours for which I claim compensation.

9. If the Court deems such appropriate, I am willing and able to supply to the Court and to counsel the volume of communications which I have accumulated as evidence of the time spent (in addition to whatever other documentation, as evidence, the Court deems appropriate). I am attaching hereto a copy of the communications from the New York State Division of Human Rights indicating that, because of my involvement as attorney for the Complainant (Plaintiff), said Division would not participate in the proceedings by its attorney (on behalf of the Commissioner).

10. Since I have been requested to provide my salary in connection with this application, in view of my employment by the National Association for the Advancement of Colored People, Special Contribution Fund, Inc., I shall provide the same for each of the last four years (in as much as this matter has been on-going since January, 1975 and in as much as the great majority of the work done herein was done in 1975, 1976, 1977, and 1978).

a. 1975/$16,184.88
b. 1976/$17,139.00
c. 1977/$20,170.11
d. 1978/$25,035.98

11. During the years, so stated, I have worked an average of sixty five (65) hours per week for fifty two weeks (52). During that period of time, I have taken virtually no vacation and I have worked for most part, six days per week. Generally, I have worked approximately twelve (12) hours per day per week and approximately five (5) hours per weekend during each of the afore-stated years. Thus, I have worked, on the average, three thousand one hundred and twenty hours (3120) for each of the afore-stated years.

12. My average salary for the years stated is $19,642.50 (nineteen thousand, six hundred and forty two dollars and fifty cents).

13. Based on the foregoing, my average hourly wage during the afore-stated period has been five dollars and eighty one cents ($5.81).

WHEREFORE and in view of the foregoing, it is respectfully requested that this Court award as attorneys fees herein the sum of ten thousand seven hundred dollars

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($10,700.00) which sum represents the amount reflected in one hundred and seven (107) hours* at one hundred dollars ($100.00) per hour.

Respectfully submitted,

/s/ JAMES I. MEYERSON, ESQ.
JAMES I. MEYERSON, ESQ.
N.A.A.C.P.—1790 Broadway
New York, New York 10019
(212) 245-2100

Attorney for Plaintiff

Sworn to and subscribed before me
this 8th day of June, 1979.

/s/ THOMAS HOFFMAN
Notary Public

THOMAS HOFFMAN
Notary Public, State of New York
No. 31-6931965
Qualified in New York County
My Commission Expires March 30, 1980

* The one hundred and seven hours is obtained by adding to the original eighty two hours, the twenty five additional hours requested herein (for appellate efforts and efforts on remand).

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(Affidavit)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CIVIL No. 77 Civ 4794

MS. CIDNI CAREY,

Plaintiff,

VS.

NEW YORK GASLIGHT CLUB, INC., et al.

JUDGE HENRY WERKER

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

James I. Meyerson, being first duly sworn, deposes and says:

1. I am one of the attorneys for the Plaintiff herein; and I execute this Affidavit in that capacity.

2. I have been primarily (almost solely) responsible for all of the representation of the Plaintiff herein and through the state administrative and judicial proceedings that heretofore have transpired.

3. I assert the facts and information set forth herein based on facts, information, and belief which I have secured as a consequence of my representation of the Plaintiff in

this proceeding and in all other proceedings attendant thereto.

4. On or about August 27, 1974, the Plaintiff, a Black American citizen, did seek a waitress position in and with the Defendant New York Gaslight Club, Inc. After auditioning and otherwise being interviewed, the Plaintiff was advised that there was no position available.

5. Believing that she was denied a position as a waitress in and with the Defendant New York Gaslight Club, Inc., because of her race and color, the Plaintiff did file a complaint with the New York District Office of the Equal Employment Opportunity Commission on or about January 9, 1975.

6. On January 24, 1975, the District Office of the Equal Employment Opportunity Commission did advise the Plaintiff's counsel that a complaint on behalf of the Plaintiff herein had been received by the office and accepted. A copy of said letter is attached hereto and made part hereof.

7. On January 28, 1975, the New York State Division of Human Rights did advise the Plaintiff that, pursuant to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000 (e)-5(c)), her complaint to the Equal Employment Opportunity Commission had been referred to said Division of Human Rights. It requested that the Plaintiff visit a particular office of the State Division within sixty (60) days for the purpose of filing a complaint with said Division. A copy of said letter of advisement is attached hereto and made part hereof.

8. On February 21, 1975, the Plaintiff did file a verified complaint with the New York State Division of Human Rights charging the Defendant New York Gaslight Club, Inc. and two of its employees (Ray Angelic and John Anderson, both of whom were in management positions) with discriminating against her by refusing to hire her because of her race and color (in substance the same charge which she brought against the New York Gaslight Club, Inc. and the two named individuals in the Equal Employment Opportunity Commission).

9. After investigation, the New York State Division of Human Rights found jurisdiction and probable cause to believe that the Defendants herein (as well as Ray Angelic who is not named herein) had engaged in an unlawful discriminatory practice.

10. Conciliation efforts failed and the case was recommended for public hearing (pursuant to the Rules and Regulations of the New York State Division of Human Rights).

11. On May 20, 1975, the Plaintiff's counsel did write to the New York District Office of the Equal Employment Opportunity Commission advising said Office that the Plaintiff herein was proceeding ahead in the State Division of Human Rights, per the referral and deferral by the Equal Employment Opportunity Commission to said State agency, and inquiring of the status of the matter before said Equal Employment Opportunity Commission. A copy of said letter is attached hereto and made part hereof.

12. On May 22, 1975, the New York District Office of the Equal Employment Opportunity Commission did respond

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to the foregoing letter and did indicate that, as soon as it was possible, an investigator would be assigned to the Plaintiff's matter and that she would be advised relative to the same. A copy of said letter is attached hereto and made part hereof.

13. From that correspondence, Plaintiff and her counsel assumed that there was an implicit advisement therein that the Equal Employment Opportunity Commission had reassumed jurisdiction of the matter and that dual jurisdiction existed.

14. Thereafter, upon due notice to all parties, the matter came on for hearing before the New York State Division of Human Rights, the Honorable Norman Mednick presiding as the duly appointed Hearing Examiner. Said proceedings commenced on September 22, 1975 and were continued to and concluded on January 15, 1976.

15. The Plaintiff herein was represented by James I. Meyerson, Esq., George E. Hairston, Esq., and Nathaniel R. Jones, Esq., all of whom represent the Plaintiff in the proceedings before this Court. James I. Meyerson, Esq., was almost solely responsible for the prosecution and preparation of the state administrative and judicial proceedings, on behalf of the Plaintiff herein; and he is solely responsible for the efforts before this Court.

16. The Defendants attorneys herein also represented them as Respondents in the New York State Division of Human Rights and the subsequent administrative and judicial proceedings attendant thereto.

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17. On August 13, 1976, the New York State Division of Human Rights did issue an order relative to this matter. A copy of the same is attached hereto and made part hereof.

18. The Division found that the New York Gaslight Club, Inc. and John Anderson (named Defendants herein) had discriminated against the Plaintiff because of her race and color and in violation of the Human Rights Law of the State of New York. The Division also concluded that Ray Angelic had not discriminated against the Plaintiff and dismissed the Complaint as against him.

19. Relying upon the same, the New York State Division of Human Rights directed the New York Gaslight Club, Inc. to offer the Plaintiff a position as a waitress and to otherwise pay over to her a sum of money (computed according to a formula set forth in the Order) as a back pay award.

20. On or about August 20, 1976, the Defendant New York Gaslight Club, Inc. did file a Notice of Appeal from the afore-mentioned decision and Order to the New York State Human Rights Appeal Board, an agency independent of the New York State Division of Human Rights.

21. At the same time, the Defendant New York Gaslight Club, Inc. did seek a stay of the operation of the Division decision and Order from the aforementioned Appeal Board; and it did secure the same absolving it from implementing the relief, as set forth, pending the outcome of the appeal therein.

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22. On August 26, 1977, the New York State Human Rights Appeal Board affirmed the findings and determination of the Commissioner of the New York State Division of Human Rights. A copy of said decision is attached hereto and made part hereof.

23. Thereafter, the Defendant New York Gaslight Club, Inc. did file an appeal with the Supreme Court/Appellate Division—First Judicial Department seeking to have the administrative determinations overturned. A stay was secured temporarily absolving said Defendant from implementing the relief, as ordered; and an expedited appeal schedule was set.

24. On November 3, 1977, the Supreme Court/Appellate Division—First Judicial Department did unanimously affirm the administrative determination and the relief ordered therein and based thereon. A copy of said Order is attached hereto and made part hereof.

25. A subsequent Motion for reargument or in the alternative for leave to appeal to the Court of Appeals was denied by the Appellate Division. Said Order was entered by the Appellate Division on January 10, 1978. A copy of said Order is attached hereto and made part hereof.

26. On February 14, 1978, the Court of Appeals of the State of New York did refuse the defendant New York Gaslight Club, Inc. leave to appeal thereto. A copy of said Order is attached hereto and made part hereof.

27. From May 22, 1975 (when Plaintiff's counsel received a correspondence from the District Office of the Equal

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Employment Opportunity Commission in response to a previous inquiry relative to the status of the matter therein) until on or about November 12, 1976 (at which time the matter was pending before the Appeal Board, the New York State Division of Human Rights having determined, at that point, that the Defendant New York Gaslight Club, Inc. was liable to the Plaintiff for discriminating against her—per the Human Rights Law of the State of New York), when counsel for the Plaintiff and a representative of the New York District Office of the Equal Employment Opportunity Commission did speak over the telephone about the status of the proceedings in the State Division of Human Rights, there were no communications between the Plaintiff and the Commission regarding the matter.

28. Subsequent to November 12, 1976 (on or about November 13, 1976), Plaintiff's counsel did forward to the New York District Office of the Equal Employment Opportunity Commission copies of the briefs and memoranda submitted by the various parties to the proceedings to the New York State Human Rights Appeal Board. A copy of the cover correspondence relative thereto is attached hereto and made part hereof.

29. On July 13, 1977 (or thereabouts), the Plaintiff did receive a letter from the District Office of the Equal Employment Opportunity Commission (in New York) notifying her that the Commission had decided not to litigate her matter (having found probable cause) and enclosing therein a Notice of Right to Sue Letter. A copy of said correspondence and the attachment thereto are attached hereto and made part hereof.

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30. Thereafter and within the mandated ninety (90) day period, the Plaintiff did file this federal action (pursuant to Title VII of the Civil Rights Act of 1964 as well as pursuant to the Civil Rights Act of 1866).

31. Plaintiff's counsel is unaware of any investigatory and/or conciliatory action taken by the Equal Employment Opportunity Commission in this matter once the matter was initially deferred and referred to the New York State Division of Human Rights, pursuant to 42 U.S.C. Section 2000 (e)-5(c), and notwithstanding that the Commission apparently reassumed jurisdiction over the matter subsequent thereto (per a legal obligation and responsibility to the Plaintiff herein).

32. Plaintiff never requested a Notice of Right to Sue Letter from the Equal Employment Opportunity Commission. In point of fact, Plaintiff never requested that the Equal Employment Opportunity Commission reassume jurisdiction over this matter pursuant to Title VII provisions and subsequent to the initial deferral and referral.

33. In point of fact, the Plaintiff elected to continue in the State Division of Human Rights pursuant to the deferral thereto by the Equal Employment Opportunity Commission and in view of the fact that the proceedings had commenced therein with reasonable dispatch (at least, initially), notwithstanding that the Plaintiff could have elected to request the Equal Employment Opportunity Commission to reassume jurisdiction sixty (60) days after

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the deferral and referral and, presumably, any time thereafter.

Respectfully submitted,

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JAMES I. MEYERSON, ESQ.
N.A.A.C.P.—1790 Broadway
New York, New York 10019
(212) 245-2100

Attorney for Plaintiff

BY: /s/ JAMES I. MEYERSON

Sworn to and subscribed before me
this 14th day of April, 1978.

/s/ MABEL D. SMITH
NOTARY PUBLIC

MABEL D. SMITH
Notary Public, State of New York
No. 61-4517944
Qualified in New York County
Commission Expires March 30, 1980